No. 357.

IN THE
United States Circuit Court
OF APPEALS
FOR THE
NINTH CIRCUIT.

MAX ENDELMAN and EDWARD LORD,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error from the District Court of Alaska.

BRIEF OF PLAINTIFF IN ERROR.

CREWS & HANNUM and C. S. BLACKETT,
Attorneys for Plaintiff in Error.

W. E. CREWS,
Advocate.

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Brief of Max Endelman, Plaintiff in Error.

At the adjourned November term of the District Court of the United States for the District of Alaska Max Endelman and Edward Lord were jointly indicted for an alleged unlawful selling of an intoxicating liquor called whiskey; (transcript of record, pages 1, 2, and 3, for copy of indictment.)

After two trials the plaintiff in error, Max Endelman, was found guilty as charged in the indictment; (transcript, p. 16, for verdict.)

Thereafter and upon the verdict so rendered the Court pronounced judgment: transcript, p. 28.)

Before pleading the defendants duly and regularly served and filed a motion

to quash the indictment; (transcript, pages 6 and 7,) which said motion was duly argued and submitted to the Court and denied; (transcript, p. 8,) to which ruling the defendants duly excepted, and now contend that the order so made was an error effecting the substantial rights of Max Endelman, one of the plaintiffs in error, and is set forth as the first assignment of error, (transcript, p. 32.)

The indictment attempts to charge defendents with violating section 14, of chapter 53, p. 28, of volume 23, United States Statutes at Large, which reads as follows:—

"SEC. 14. THAT THE PROVISIONS OF CHAPTER THREE, TITLE TWENTY-THREE, OF THE REVISED STATUTES OF THE UNITED STATES, RELATING TO THE UNORGANIZED TERRITORY OF ALASKA, SHALL REMAIN IN FULL FORCE, EXCEPT AS HEREIN SPECIALLY OTHERWISE PROVIDED; AND THE IMPORTATION, MANUFACTURE AND SALE OF INTOXICATING LIQUORS IN SAID DISTRICT, EXCEPT FOR MEDICINAL, MECHANICAL AND SCIENTIFIC PURPOSES, IS HEREBY PROHIBITED UNDER THE PENALTIES WHICH ARE PROVIDED IN SECTION NINETEEN HUNDRED AND FIFTY-FIVE OF THE REVISED STATUTES FOR THE WRONGFUL IMPORTATION OF DISTILLED SPIRITS. AND THE PRESIDENT OF THE UNITED STATES SHALL MAKE SUCH REGULATIONS AS ARE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS SECTION.

"APPROVED MAY 17, 1884."

This indictment being founded upon an alleged violation of a federal statute, therefore, we must look to these statutes, or, in the absence of any, to the common law, to determine the sufficiency of the indictment.

Section 1024, United States Revised Statutes, provides how indictments shall be drawn, and reads as follows:—

"SEC. 1024. WHEN THERE ARE SEVERAL CHARGES AGAINST ANY PERSON FOR THE SAME ACT OR TRANSACTION, OR FOR TWO OR MORE ACTS OR TRANSACTIONS CONNECTED TOGETHER,OR FOR TWO OR MORE ACTS OR TRANSACTIONS OF THE SAME CLASS OF CRIMES OR OFFENCES, WHICH MAY BE PROPERLY JOINED, INSTEAD OF HAVING SEVERAL INDICTMENTS THE WHOLE MAY BE JOINED IN ONE INDICTMENT IN SEPARATE COUNTS; AND IF TWO OR MORE INDICTMENTS ARE FOUND IN SUCH CASES, THE COURT MAY ORDER THEM TO BE CONSOLIDATED."

The first contention in the defendant's motion to quash is:

"*That two or more offences are charged in the same count and in the same indictment.*" If this be true it is in direct violation of Sec. 1024, above quoted, and the Court erred in denying the motion.

Under the Statute alleged to have been violated (if any sale of intoxicating

liquor is a crime, and this subject will be treated hereafter) *every sale is a separate and distinct crime.* The exact number of offences the Grand Jury intended to charge the defendants with in this indictment cannot be determined from the indictment; however, several distinct offences are charged. The first offence attempted to be charged is the alleged selling to "*John Doe an intoxicating liquor called whiskey, to-wit: one glass, pint, quart, gallon of said liquor,* * * * " If the sale of a glass of whiskey to John Doe is a crime under the statute, the sale of a pint, a quart or a gallon, constitutes another, separate and distinct crime. In other words, every sale to John Doe constitutes a crime, and being of the same class of crimes, or offences, the statutes permits them to be joined in one indictment, but each offence must be charged in a *separate count.* If the defendants sold to John Doe a glass of whiskey this offence should be charged in one count. If on the same day, or at some other time, he sold to John Doe a pint of whiskey this offence should be charged in a separate count, and so on, in like manner, making a separate count for each offence.

The purpose and intent of the Statute is plain:

1. That the several offences of the same class may be tried at the same time.

2. That a trial jury may be able to render a verdict intelligently by returning a verdict of guilty upon some one or more counts, and not guilty on other counts, as the evidence may warrant.

3. The verdict thus rendered better enables the Court to pass judgment and fix the penalty, the extent of the defendant's punishment being determined in a measure by the number of offences he may be found guilty of committing.

4. That the defendant's conviction or acquittal may inure to his subsequent protection should he be again questioned on the same grounds.

The defendant Max Endelman was found guilty, "as charged in the indictment." *This means that he was found guilty of selling to John Doe and Richard Roe, and to divers other persons, whose real names are unknown, an intoxicating liquor called whiskey, to-wit: One glass, one pint, one quart, one gallon of said liquor on or about the 7th day of December, 1896, and at divers other times.* To how many other persons did he sell liquor to besides John Doe and Richard Roe? At how many other times did he sell liquor than the 7th day of December, 1896, and when and to whom? The indictment fails to disclose, and the verdict of the jury and the judgment of the Court are as equally uncertain. How then could the defendants plead or prepare for trial? Suppose Mr. Endelman was subsequently indicted for selling liquor to *Henry Jones* or some other person, whose true or real name is to the Grand Jury unknown, on the 25th day of November, 1896. How would the defendant or the Court be able to know that Henry Jones was not one of

the persons described in the former indictment as one of the "divers other persons?" Likewise, how would the defendant or the Court be able to determine whether or not the day of the alleged selling, November 25th, 1896, was not one of the "divers other times," mentioned in the former indictment? It might be the same date and person considered by the trial jury and upon which they agreed and based their verdict, and still the defendant would be deprived of the information that would enable him to plead a former conviction. He would be powerless to protect himself from being twice put in jeopardy for the same offence. Again, if evidence was introduced to prove twelve or more different offences (and in this case testimony was introduced tending to prove several separate and distinct sales) the jury might find a verdict of guilty without any two of them agreeing that the defendant was guilty of any particular one of such offences; one juror might believe that he was guilty of one offence; another juror of another, and so on with respect to all of the jurors and all of the offences which the evidence possibly tended to prove, and yet no two of the jurors agreeing that the defendant was guilty of the same offence.

The Statute under which the defendants were indicted makes every separate sale a crime and in this respect it differs materially from an indictment charging the defendant with keeping a place or maintaining a nuisance where intoxicating liquors are sold. Under an indictment of this character any number of sales may be shown, and the State is not required to elect upon which sale it will rely for a conviction. The gravamen of the offence, in the first instance, is the *sale of intoxicating liquors.* In the second instance it is the *maintaining of a place as a nuisance where intoxicating liquors are sold.* It may be claimed from the language of the indictment that the defendant only sold liquor to John Doe at one time and that the Grand Jury were unable to determine whether it was one glass, one pint, one quart, or one gallon. Under such a construction there would be but one offence charged and only one count required in the indictment. But we contend that such a construction is not the logical one, for the reason that if it was intended by the Grand Jury to mean only one sale to John Doe instead of enumerating several quantities, it would have been stated: "*a quantity of liquor, the amount of which is to the Grand Jury unknown.*"

If the indictment charges a sale to *John Doe*, it also charges a sale to *Richard Roe*; the language of the indictment as to *John Doe* and *Richard Roe* is identical. The sale to *John Doe* and *Richard Roe* are *two separate and distinct offences of the same class of crime*, and while they may be joined in the same indictment they must be set forth in *separate counts*, as provided for in the Statute above mentioned. If it is a crime to sell to John

Doe, it is equally as great a crime to sell to Richard Roe, both acts of selling constituting a separate and distinct crime neither allegation can be rejected as surplussage, and the crimes being charged in the same count in the same indictment renders the indictment fatally defective for duplicity, the second ground assigned in defendant's motion to quash the indictment.

U. S. vs. Patty, et al, 2nd Fed. Rep. 664.
" " Nye, " " " 888.
" " Wanthworth, 11th Fed. Rep. 52.
State of Kansas vs. Chandler, 1st Pac. Rep. 887.
" " Michael Crimmins, 2d Pac. Rep. 574.
" " Hahn, 2d Pac. Rep. 574.
" " Lund, 30th Pac. Rep. 518.
Leidtke vs. City of Saginaw, 4th Northwestern Rep. 627.
Burrell vs. the State of Nebraska, 41 Northwestern Rep. 399.
Com. vs. Ismahl, 134 Mass. 302.
Com. vs. Darling, 129 Mass. 112.
Pelts vs. Com., 126 Mass. 242.
Com. vs. Kimball, 73 Mass. 328.
Com. vs. Hill, 64 Mass. 530.
Carlton vs. Com., 46 Mass. 532.
State vs. Glidden, 55 Conn. 46.
Mergertheim vs. State, 107 Ind. 567.
Tahnestock vs. State, 102 Ind. 156.
Davis vs. State, 100 Ind. 154.
State vs. Weil, 89 Ind. 286.
Knoff vs. State, 84 Ind 316.
65 A. M. Dec. 383-386.
58 " " 338-334.
54 " " 499.
47 " " 588-599.
Gould and Tucker's notes on Revised Statutes, 343-4-5.

It may be contended that John Doe and Richard Roe are mythical persons. This contention cannot prevail for the reason that the indictment sets forth a sale to these persons without any reference to their being unknown. The allegation of a sale to "divers other persons whose real names are unknown" has no reference to John Doe and Richard Roe, and only relates to those unknown persons referred to in the indictment. Had the indictment read to John Smith and Richard Brown, and to divers others persons whose real names are unknown, no one would contend that the words "whose real names are unknown" had any reference to John Smith and Richard Brown. Why then

should any other construction be placed upon it when the names of John Doe and Richard Roe appear instead of John Smith and Richard Brown? Nothing can be assumed in favor of the indictment. The indictment must be explicit and leave nothing to inference, for nothing can be done by intendment.

State vs. Verrill, 54 Me. 408.
State vs. Philbrick, 31 Me. 401.
Com. vs. Rowell, 146 Mass. 128.
U. S. vs. Hess, 124 U. S. 483.

Because the names John Doe and Richard Roe are sometimes employed to describe persons whose real names are unknown it cannot be assumed that it was the intention to so use the names in this indictment. On the other hand, if they were used to represent persons whose real names are unknown it would make no difference in the application of the Statute, Sec. 1024, above set forth, because the same number of offences would still be charged in the same indictment and in the same count, rendering the indictment fatally defective for duplicity.

The authorities above cited, nearly all of which refer to the Statute quoted, bear directly upon this question, and the Court in each of those cases held that indictments drawn as this one is are fatally defective for duplicity.

The third ground set forth in the motion to quash is disposed of by the decision of the Court in the case of

State of Kansas vs. Crimmins.
" " Hahn, 2nd Pac. Rep. 574.
" " Lund, 30 " " 518.

We contend that the motion to quash should be granted upon the forth ground set forth in said motion, for the reason that the indictment is too indefinite and uncertain as to what law the defendant violated in the alleged sale of intoxicating liquors. It does not state whether the defendants violated the act providing a Civil Government for Alaska, or the Revenue laws, or the Regulations issued by the President of the United States, and, further, that the indictment is too vague, indefinite and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defence.

State of Kansas vs. Burket, 32 Pac. Rep. 926.
U. S. vs. Cruikshank, et al, 92 U. S. 542.
Gould and Tucker's notes, p. 345.
U. S. vs. Goggon, 1st Fed. Rep. p. 49.
The motion to quash should have been granted.

Immediately after the order of the Court was entered denying the motion to quash and exception taken, the defendants interposed a demurrer to the indictment (transcript, p. 9,) which demurrer was overruled by the Court, (order overruling demurrer, transcript, p. 10,) to which ruling the defendants duly excepted and now contend that the order so made was an error effecting the rights of Max Endelman, plaintiff in error, and is set forth as the second assignment of error, (transcript, p. 33.)

The first ground of the demurrer "that the Court has no jurisdiction over the subject matter of the action" presents the question as to the constitutionality of the law upon which the prosecution is based.

Sec. 14, Chap. 53, p. 28, Vol. 23, U. S. Statutes at Large.

We concede that the District Court of Alaska has jurisdiction of all crimes and offences cognizable under the authority of the United States committed within the district of Alaska.

U. S. Revised Statutes, Sec. 563 and 629, subdivision 20.

Sec. 7, p. 23, Vol. 23, U. S. Statutes at Large.

It is the duty of the Court to declare all legislative enactments that are in conflict with the Constitution void.

Vol. 3, A. M. and Eng. Ency. of Law, p. 673-4 and notes.

Cooley's Con. Lim. p. 194-186-209.

The government of the United States is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation, because it can exercise only those specific powers conferred upon it by and enumerated in the Constitution.

The powers of the government and the rights of the citizens under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise any other. It has no power over the person or property of a citizen except what the citizens of the United States have granted it. The legislative, executive nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the Constitution. The power of Congress over the person or property of a citizen can never be a discretionary power under our constitution and form of government, for the reason that the powers of government and the rights and privileges of the citizen are plainly and specifically defined by the constitution itself. These questions have been settled by the Supreme Court of the United States in the case of

Scott vs. Sandford, 19th How. U. S. pages 401 to 450.

and the principles of law laid down in that decision upon these questions have been followed by the Courts of the United States in all subsequent adjudications.

The provisions of Sec. 3 of Article 4, of the Constitution, provides, among other things, that "*Congress shall make all needful rules and regulations respecting the territories, etc.*," has no application whatever to the Territory of Alaska or the powers of the general government over Alaska, or the rights of its citizens for the reason that that provision of the Constitution related solely to the Territory ceded to the United States by the several States for the purpose of enabling Congress to dispose of the Territory and appropriate the proceeds as a common fund for the common benefit, protection and preservation of the several States, and was intended to be confined to the Territory which at that time belonged to, or was claimed by the United States and within their boundaries, as settled by the treaty with Great Britain, and has no application to, or confers any power upon Congress to control, or regulate, or legislate for any territory afterwards acquired from a foreign government, by treaty or conquest.

Scott vs. Sandford, 19th How. U. S. pages 432 to 446.

We concede that the National Government has the power through Congress to acquire territory by treaty with foreign nations. This being the rule, the next question to consider is the power of Congress over the territory acquired and its right to legislate for the Territory and from what source it derives its power. It has been held by the Supreme Court of the United States *that the right to acquire territory by the United States carries with it the inevitable right to govern the acquired territory*, and that in so doing exercises the combined powers of the National and State Government; hence, the right to govern Alaska is derived from the right to acquire it.

Am. Ins. Co. vs. Carter, 1 Pet. U. S. 542.

Bunner vs. Porter, 9th How. U. S. 235.

Cross vs Harrison, 16th How. U. S. 194.

Scott vs. Sandford, 19lh How. U. S. 439-454.

However, on the acquisition of territory by treaty the United States does not succeed to the *prerogative rights* of the former sovereign, but holds it subject to the institutions and laws of its own government, limited to the restricted powers specifically conferred upon Congress by the Constitution. In other words, whatever it acquires it acquires for the benefit of the whole people of the several States who created it. The National Government is their trustee acting for them, and charged with the duty of promoting the interest of the whole people of the Union, limited, however, in the exercise of the powers specially granted to it by the sovereign people who created it.

Taking this as a rule to guide us, and we contend that this is the correct rule, we claim that citizens of the United States who emigrate to a Territory belonging to the people of the United States cannot be ruled as mere colonists,

dependent upon the will of the general government and to be governed by any laws it may think proper to impose, except such laws as are clearly within the enumerated and restricted powers delegated to Congress by the Constitution, and we contend that Congress cannot by law restrict or abridge the rights and privileges of citizens residing within the States in respect to their commercial relations and dealings with the citizens of the United States who may emigrate to the acquired Territory any more or to any greater extent than it can or does between citizens of different States. There is certainly no power given by the Constitution to the National Government to acquire territory to be ruled and governed at its own pleasure permanently. The only manner it can enlarge its territorial limits in any way is by the admission of new States.

Scott vs. Sanford, 19 How. 445-454.

The power of Congress over the territory originally ceded to it by the several States and that which the government may have acquired subsequently by treaty or conquest is a very much different power than Congress exercises over the district of Columbia, the territory ceded to the government and accepted by Congress to become the seat of government of the United States.

In the first instance the power is restricted.

In the second instance the power is unrestricted.

Constitution, Article 1, Sec. 8.

" " 4, " 3.

Scott vs. Sanford, 19 How. 440-454.

The Constitution guarantees to the citizens the right to own, hold and acquire property, and makes no distinction as to the character of the property. Intoxicating liquors are property and are subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists and are so recognized by the usages of the commercial world and the decisions of Courts and laws of Congress.

Leisy vs. Hardin, 135 U. S. p. 100.

No word can be found in the Constitution which gives Congress a greater power over this species of property, or which entitles property of this kind to less protection than property of any other description, and the power conferred upon Congress is coupled with the duty of protecting the owner in all of his property rights. The power to regulate commerce "*among the the several States*" carries with it the right to regulate commerce among the several states, territories and districts.

Commerce has been judicially defined by Justice McLean in Smith vs. Turner, How. U. S. p. 401, to be "An exchange of commodities," and includes "Navigation and intercourse." When the power to regulate commerce "* * * * among the several states * * * *" was committed to Congress

there can be no doubt that the paramount idea in the minds of the framers of the Constitution, was to secure a uniform and permanent system of commercial relations between the whole people of the United States and prevent any embarrassing restrictions that might be imposed by any State against the free importation of commodities from another State. It does not tax the imagination to see how easily commerce could be obstructed, in fact, virtually destroyed, if the power to control it within the exterior boundaries of each State rested in the State Government. This power alone would create sectionalism, and long since would have divided the Nation into geographical subdivisions equal in number to the vacillating opinions of State legislators, and the caprice of successful political party leaders and agitators; hence, the power to regulate commerce was committed to Congress in order to secure its absolute freedom from all restrictions. Therefore, we contend that inasmuch as the power to regulate commerce was committed to Congress to relieve it from all restrictions that Congress itself cannot violate the spirit or intent which prompted the placing this power under its control by doing the very thing sought to be avoided, namely: restricting commerce. Therefore, we contend that an Act of Congress passed in pursuance of this delegative authority, which restricts the free importation of any commodity recognized by the usages of the commercial world, the laws of Congress and the decision of the Courts as a proper subject of commerce into any portion of the United States and permits the same commodity to be freely exported into other portions, is in direct violation of the rule governing interstate commerce, as recognized by Congress and the decision of the Courts, to-wit: "That such commerce shall be *free* and *untrammeled.*"

The power delegated to Congress to regulate commerce has been jealously guarded by the Courts, and every enactment of the several State Legislatures that has tended to interfere with a *free* and *untrammeled* commerce has been adjudged unconstitutional, and these decisions have been based upon the broad principle that this nation is a great union of states in which the whole people have a common interest coupled with the free and unrestricted right of commercial relations with each other and to secure a more perfect union of interest. Will the Courts, on the other hand, permit Congress to enact and enforce laws that in any manner restricts and abridges the very end sought to be attained by conferring the power to regulate commerce? We think not. The people of Alaska are as much a part of the sovereignty of this nation as those of any of the States and are equally entitled to the same rights, privileges and immunities, and entitled to enjoy free and untrammeled commercial relations with every other section of the United States, and every citizen of the United States residing outside of Alaska is entitled to enjoy by every principle upon

which the nation is founded free and unrestricted intercourse with the people of Alaska, unhampered by any Act of Congress that is not made applicable to every section of the United States.

The Supreme court in Leisy vs. Harding, 135 U. S. p. 100, In construing an Iowa Statute prohibiting the importation of intoxicating liquors into the State decided that the law was unconstitutional upon the ground that intoxicating liquors are property and a recognized subject of commerce, barter and exchange, and that it restricted the rights of its own citizens and those of the State of Illinois in their commercial relations. No one would contend that Congress under the delegated power to regulate commerce would have the right to enforce a law prohibiting the importation of wheat grown in Minnesota into the State of Illinois, nor into the Territory of Oklahoma and permit the wheat to be imported into New Mexico, or to prohibit the importation of the products of the soil of Wisconsin or of the factories of New Jersey into the Territory of Alaska. As subjects of commerce, barter and exchange, intoxicating liquors are entitled under the interstate commerce law to be as freely imported from one section of the country to the other as any other recognized subject of commerce.

Leisy vs. Harding, 135 U. S. p. 100,

and many other authorities cited by Chief Justice Fuller in support of his opinion concurred in by a majority of the Supreme Court.

The sale of intoxicating liquors as a beverage is regulated by the several States under police regulations, and it may be said that the sale of intoxicating liquors within the Territory of Alaska may be controlled by Congress exercising police regulations. We reply to such a contention; first, that the police powers belong to the State and have never been delegated to Congress, except so far as Congress may exercise it over the territories and District of Columbia.

Am. and Eng. Ency. of Law, Vol. 18, p. 745.

State vs. DeWitt, 9, Wal. U. S. 41.

and cases cited, where it is said that this principle is so well fixed as to be beyond all controversy. Second, that if Congress has the right to regulate the sale of intoxicating liquors within the territories, it can only enact laws applicable to all the territories; in other words, it has no power to enact a law prohibiting the sale of intoxicating liquors in the Territory of Alaska that would not be applicable to the Territory of New Mexico. In exercising its legislative functions it cannot abridge the privileges of some of its citizens and grant them to others any more than a State Legislature could enact a law prohibiting the sale of intoxicating liquors in one country and permitting the sale in another. Any state law regulating the sale of intoxicating liquors must be

a general one applicable to the same class. It was said by Justice Taney in his opinion in the Fred Scott case "That when the Constitution of the United States was framed it created a new government separate and distinct from the several State Governments, with limited and restricted powers." If the eminent jurist was correct, and we think it has not been questioned, this new government exercising its legislative functions must frame its laws so as to make them applicable to all of its citizens equally.

Police powers can only be exercised by legislative enactment, and while it rests within legislative discretion to determine when public welfare or safety requires its exercisce, courts are authorized to interfere and declare a statute unconstitutional when it conflicts with the Constitution, and there must always be a reason for the exercise of the police power and rights guaranteed by federal or state constitutions cannot be violated by the mere declaration that an occupation or any particular act is injurious to the public welfare.

Am. and Eng. Ency. of law, Vol. 18, p. 746.

and numerous cases cited.

The Government of the United States was not formed to enlarge the rights of citizens. It has no power to do so. Its functions are to secure and protect the rights and privileges that are inherent in the people and it does not possess any power to restrict or abridge these rights.

In passing upon the constitutionality of this law the Courts will inquire, first, is there a reason for the law? Second, does it take away from the citizens of Alaska any of the rights or privileges that other citizens of the United States living under the direct control of the federal government enjoy? Construed under the rule governing police regulations, as above set forth, if the Court can find no reason for the law, it should be adjudged unconstitutional. And, again, if the Court finds that by enforcing this federal police regulation that it is not universal in its application and abridges rights to some of the citizens that others enjoy, it should be declared of no force or effect.

What reason can be found for the law? It cannot be justified upon the hypothesis that the people of Alaska are so depraved in comparison with the rest of mankind that they require special legislation in this respect. Nor upon the ground that this is an Indian country.

In U. S. vs. Kie, 27 Fed. Rep. 355,

it was held that Alaska was not an Indian country.

The majority of the people of Alaska should be permitted to express their will as to the prohibition of intoxicating liquors in Alaska; its importation, sale and use should be regulated, if at all, by the expressed will of the majority, and not by the arbitrary will of a legislative body composed of members in the choice of which the Alaska citizen has no voice. The civil government

act, in so far as it prohibits the importation and regulates the sale of intoxicating liquors in Alaska, violates the fundamental and time-honored principles of republican institutions and should be declared void. Since the creation of our National Government Congress, for the first time, has seen fit to depart from those principles and enact arbitrary law, disregarding the will of the people, and it should be stopped at its first attempt. Why should Alaska be singled out? There can be no reason for it. Its condition does not differ from those that existed in other territories acquired by treaty. Its natives are much less fierce and warlike than those found in the territory ceded by the northwest treaty. At the time the civil government act was passed the object in view was to provide a *civil government* for Alaska. (The police regulation, if that clause in the act prohibiting the importation, manufacture and sale of intoxicating liquors in Alaska, can be called a police regulation), was not a proper subject of legislation in connection with the act, and from the wording of the paragraph and the position it occupies in the act, it is evident it was not under consideration by Congress, but was tacked on to meet the approval of some member whose idea of the liquor traffic was more nice than wise. It is the first time in the history of the Nation that a police regulation has been forced upon the people without an expression of the people governed by it. If Alaska is to continue to be governed by the Federal Government, Congress should not be permitted to enact and enforce police regulations without first giving the people of Alaska the right to be heard, either by submitting the proposed legislation to a vote of the citizens or permit them to be heard through a representative in Congress.

Article 1, Section 9, of the Federal Constitution, in defining the restrictions upon the powers of Congress, says:

"NO PREFERENCE SHALL BE GIVEN BY ANY REGULATION OF COMMERCE OR REVENUE TO PORTS OF ONE STATE OVER THOSE OF ANOTHER, * * *"

Forbidding the importation of intoxicating liquors into the Territory of Alaska by Congress is a regulation of commerce, and a preference in favor of every other port of the United States as against all Alaska ports. We contend that this section of the Constitution bears directly upon the question under consideration, and furnishes sufficient ground, standing alone, to warrant the Court in adjudging that portion of the civil government act prohibiting the importation of intoxicating liquors unconstitutional. We maintain in view of the well established principle above set forth that the civil government act of Alaska, in so far as it relates to the importation and sale of intoxicating

liquors, in original packages, is unconstitutional, and that the demurrer should be sustained.

If the Court should be of the opinion that, that portion of the civil government act, which prohibits the importation of intoxicating liquors into Alaska, and their sale in original packages is unconstitutional then the indictment is fatally defective for uncertainty, for the reason that it does not contain a negative allegation to the effect that the alleged sale was not made in the original packages. The right to import intoxicating liquor carries with it the right to sell the same in original packages.

Leisy vs. Harding, 135 U. S. p. 100, and authorities cited.

The provisions of Chapter 3, Title 23, of the Revised Statutes, relating to the unorganized Territory of Alaska, are kept in full force by the Act providing a civil government for Alaska. (Section 14 of Chapter 53, Vol. 23, U. S. Revised Statutes at Large.)

SEC. 1955, REVISED STATUTES, PROVIDES, "THAT THE PRESIDENT SHALL HAVE POWER TO RESTRICT, REGULATE OR TO PROHIBIT THE IMPORTATION AND USE OF FIREARMS, AMMUNITION AND DISTILLED SPIRITS INTO AND WITHIN THE TERRITORY OF ALASKA * * * AND ANY PERSON WILLFULLY VIOLATING SUCH REGULATIONS SHALL BE FINED NOT MORE THAN $500.00, OR IMPRISONED MORE THAN SIX MONTHS * * *"

The power of the President under this law is limited to making rules and regulations restricting, regulating and prohibiting the *importation* and *use* of distilled spirits into and within the Territory of Alaska. The President has no power under this Statute to restrict, regulate, or prohibit the *sale of intoxicating liquors in Alaska*, and in the executive order issued by the President he only regulated the sale for medicinal, mechanical, and scientific purposes; sales for other purposes were not restricted, or attempted to be restricted by the order.

Executive order dated March 12, 1892.

Section 14, of Chapter 53, above quoted, provides, "and the President of the United States shall make such rules as are necessary to carry out the provisions of this section."

Until such a time as the President promulgates regulations in regard to the sale of intoxicating liquors this section remains inoperative. Subsequent to the inactment of this Statute the President made rules and regulations concerning the sale of intoxicating liquors, but did not provide by the rules so pro-

mulgated any regulation relating to the sale of intoxicating liquors, except for mechanical, medicinal, and scientific purposes.

Seetion 1955 of the Revised Statutes, above cited; imposes certain penalties, i. e. "a fine of not more than $500.00, or imprisonment for more than six months."

By reference to this Statute it will be observed that the penalties provided for are not imposed for the *importation*, *manufacture*. or *sale* of intoxicating liquors into and within the Territory of Alaska, nor for the violation of any *Statute prohibiting the importation*, *manufacture*, or *sale* of *intoxicating liquors* into or within the Territory of Alaska, but it provides that they may be *imposed* for the *willful violation* of the REGULATIONS made by the PRESIDENT. Until there are REGULATIONS to violate there is no PENALTY to impose.

Section 14, of the Civil Government Act, provides that the importation, manufacture and sale of intoxicating liquors in said district, except for certain purposes enumerated in the Statute, is prohibited under the *penalties* which are provided in *Section 1955 of the Revised Statutes*, and this statute is kept in full force. As above stated, this section provides for no penalty, except for the *willful violation* of the PRESIDENT'S RULES; therefore, we contend that until the President shall make rules regulating the sale of liquor that the said section 14 of the Civil Government Act is inoperative.

From the records of this case there can be no reasonable contention that the plaintiff in error has *violated* any *rule* or *regulation* made by the *President*. Therefore he is not subject to any penalty and should have been discharged.

Again, under section 1955 no power is given to the President except to *restrict*, *regulate* or *prohibit* the *importation* and *use* of distilled spirits. It does not clothe him with power to restrict, regulate, or prohibit the sale or manufacture of intoxicating liquors within the Territory of Alaska.

We contend therefore that there is no law in Alaska prohibiting the acts complained of in this Indictment; the Court however put the defendants on trial.

After the jury had been empaneled and sworn to try this case, and the witness, William Hale, sworn on behalf of the prosecution, the defendants moved the Court to require the District Attorney to elect upon which particular sale he would rely for a conviction; (Bill of exceptions, transcript, p. 53, last par.)

To the ruling of the Court denying said motion the defendants excepted, and now contend that the Court committed an error effecting the substantial rights

of Max Endelman, as set forth in the third assignment of error; (transcript p. 33).

Immediately after the prosecution rested its case, evidence having been introduced tending to prove several distinct and separate sales at different times to different persons, the defendants moved the Court to require the District Attorney to elect upon which sale of liquor attempted to be proven he chose to rely for a conviction; (Bill of exceptions, p. 37).

The Court denied the motion and his ruling is assigned as error. (8th assignment of error, transcript, p. 34).

The third and eighth assignment of error are considered together in this brief.

While the prosecution has offered evidence tending to prove several distinct and substantive offences it is the duty of the Court upon the motion of the defendant to require the prosecution, before the defendant is put upon his defence to elect upon which particular transaction the prosecution will rely for a conviction.

State vs. Schweiter, 27 Kan. 500-512.
State vs. Crimmins, 2 Pac. Rep. 574.
State vs. Hahn, 2 Pac. Rep. 574.
See opinion, p. 576, beginning with the last par.
State vs. O'Connell, 2 Pac. Rep. p. 579.
State vs. Guettler, 9th Pac. Rep. p. 200.

Justice Valentine in his opinion in State vs. Crimmins, clearly disposes of this proposition of law in the followlug language:

"ANY OTHER RULE WOULD OFTEN WORK INJUSTICE AND HARDSHIP TO THE DEFENDANT. IF ANY OTHER RULE WERE ADOPTED, THE DEFENDANT MIGHT BE CHARGED WITH A COMMISSION OF ONE OFFENCE, TRIED FOR FIFTY, COMPELLED TO MAKE DEFENCE TO ALL, BE FOUND GUILTY OF AN OFFENCE FOR WHICH HE HAD MADE NO PREPARATION AND HAD SCARCELY THOUGHT OF, AND FOUND GUILTY OF AN OFFENCE WHICH WAS REALLY NOT INTENDED TO BE CHARGED AGAINST HIM; AND, IN THE END, WHEN FOUND GUILTY, HE MIGHT NOT HAVE THE SLIGHTEST IDEA AS TO WHICH OF THE OFFENCES HE WAS FOUND GUILTY. ALSO IF EVIDENCE WAS INTRODUCED TENDING TO PROVE TWELVE OR MORE DIFFERENT OFFENCES THE JURY MIGHT FIND HIM GUILTY, WITHOUT ANY TWO OF THE JORORS AGREEING THAT HE WAS GUILTY OF ANY PARTICULAR ONE OF SUCH OFFENCES. ONE JUROR MIGHT BELIEVE

THAT HE WAS GUILTY OF ONE OFFENCE, ANOTHER JUROR OF ANOTHER, AND SO ON WITH RESPECT TO ALL OF THE JURORS AND ALL THE OFFENCES, EACH JUROR BELIEVING THAT DEFENDANT WAS GUILTY OF SOME ONE OF THE OFFENCES WHICH THE EVIDENCE POSSIBLY TENDED TO PROVE, BUT NO TWO JURORS AGREEING THAT HE WAS GUILTY OF THE SAME IDENTICAL OFFENCE."

The law requiring the District Attorney to elect in such cases is in furtherance of justice; hence, the refusal of the Court below to require the prosecution to elect upon which one of the sales attempted to be proven it would rely upon for conviction was material error, or affecting the substantial rights of the defendants.

After the Court having refused to require the District Attorney to elect upon which sale he would rely for a conviction defendants' motion to discharge the defendants, made at the close of the prosecution, should have been granted; (Bill of Exceptions, transcript, p. 56, and the 7th assignment of error, transcript, p. 34;) for the reason that the defendants should not have been required to interpose any defence to an indictment so vague, indefinite, and uncertain, and for the further reasons set forth in said motion.

The Court committed manifest error, as set forth in the fifth assignment of error; (transcript, p. 34.)

The Court permitted the prosecution to prove any number of sales to any number of persons at any time within one year prior to the date of the indictment and without requiring the District Atttorny to state the several offences alleged to have been committed in separate counts in the indictment, or to elect upon which offence he would rely for a conviction, compelled the defendants to go to trial without any knowledge or information as to what charge the prosecution intended to convict, and after conviction would leave the defendants without the slightest idea as to which of the offences they were found guilty. The orders of the Court below inflicted upon defendants an injustice against which they have no remedy, except in this Court.

The theory of the prosecution during the trial of these defendants was that they and each of them had committed several separate and distinct offences by selling intoxicating liquors to several persons at different times and upon this theory the Court permitted them to try the case and allowed the prosecution, over the objection of the defendant to prove any number of sales to any number of persons and at any time within one year prior to the date of the indict-

ment without any reference as to whether the defendants were charged in the indictment with sales to those persons. The testimony introduced failed to disclose any sale of liquor to John Doe or Richard Roe; the only two persons named in the indictment to whom liquor was alleged to be sold; thus leaving the defendants absolutely ignorant and entirely helplesss to prepare a defence and in this condition they were forced to trial by the Court.

At the trial the defendant Max Endelman offered in evidence in his behalf a special tax stamp, issued by the Collector of Internal Revenue for the District of Oregon, which includes the District of Alaska; (bill of exceptions, transcript, pages 58 and 59, for copy of stamp.) The Court refused to allow the same to be introduced in evidence, and his refusal is assigned as error; (ninth assignment of error, transcript, p. 35.)

The evidence offered clearly shows that so far as the Government of the United States is concerned the defendant had complied with all of its rules and regulations relating to the revenue law. It clearly shows that Max Endelman had paid the tax required by the government from a person engaged in the business of a retail liquor dealer at Juneau, Alaska, from July 1st, 1896, to July 1st, 1897. We contend that the defendant had the right to have the fact that he had paid his tax considered by the jury for the purpose of showing that he had complied with the Revenue laws, and had acted in good faith towards the government of the United States, and for the further reason that it bears directly upon the question of intent. When the government of the United States took the defendant's money for a tax on his business as a retail liquor dealer at Juneau, Alaska, he had the right to suppose that he could follow that business unmolested by the government that received his money and issued its receipts and required him, under severe penalties, to place and keep the stamp, or receipt, conspiciously in his establishment or place of business. If the defendant honestly believed, (and he had a perfect right to believe), that after paying this tax, which was received by the government, that he had the right to pursue the business for which he had paid the tax in Alaska, he was not guilty of any crime; intent to violate the law or commit a crime is one of the essential elements necessary to constitute a crime.

It will also be observed that there is printed in red ink upon the face of the revenue stamp offered in evidence the following words and figures:

"This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement or continuation of such business contrary to the

aws of said State, or in places prohibited by municipal laws." (Transcript, p. 59).

If the defendant was conducting a retail liquor business within any State or municipal corporation this would clearly be a notice to him that the tax receipt did not exempt him from any penalty or punishment provided for by the laws of such State, or municipal corporation. In Alaska there is no State or municipal law regulating the sale of intoxicating liquors to violate; the defendant then would only be guilty, if guilty at all, of violating some law of the general government.

Is it reasonable to say that the defendant would believe that the Government would tax his business and take his money in payment of such tax and then prosecute him for carrying it on? If the defendant can be charged with the knowledge that it is unlawful to sell liquor in Alaska, the government of the United States, which enacted the law, should at least be charged with equal knowledge. If the Government intended to prosecute persons for carrying on the retail liquor business in Alaska, was it not the plain duty of the Government to so inform the defendant at the time he applied for the revenue stamp and refuse to sell it to him? Was it not reasonable for the defendant to suppose that when he paid his money and the Government received it that so far as the Goverment was concerned that he would be permitted to carry on the business? Defendant surely thought so, and he had a perfect right to think so; hence the contention that the Court erred in refusing to admit the evidence. If the Court's position was correct the Government has surely taken an anomalous position in these cases, by receiving some of the fruits of an unlawful business and then prosecuting the other party to the crime.

In connection with the ninth assignment of error we desire to call the Court's attention to subdivision eight of the tenth assignment of error; (p. 37 of the transcript), and to that portion of the Court's charge to the jury bearing upon the offer of the defendants to introduce the revenue stamp above referred to. (charge of the jury, transcript, p. 19).

We contend that inasmuch as the Court excluded the testimony and refused to allow the jury to consider it, that it was error for the Court to instruct the jury in relation to the testimony so excluded; that the Court has no right to comment upon or instruct the jury in regard to any testimony offered and excluded by him; that in so doing the jury is liable to be confused and the defendant suffer thereby.

The Court erred in charging the jury as set forth in the tenth assignment of error, (transcript, page 35), to which instructions the defendants duly excepted. (Bill of exceptions, transcript, p. 60).

The Court instructed the jury "that the fact that it was a glass, pint, or quart, cuts no figure, as the law authorizes the allegation to be made in that way" tended to mislead the jury, they having the right to conclude from the instructions that if they found that the defendants had sold any quantity of liquor to any person within a year previous to the date of the indictment that it became their duty to find the defendant guilty without reference to his opportunities of having any knowledge of what particular offence the Government would attempt to prove against him, and without any opportunity of preparing a defense or meeting the allegation.

The Court committed manifest error in giving instructions to the jury, as set forth in the 12th paragraph of the 10th assignment of error; (transcript, p. 39); to the giving of such instructions the defendant duly excepted. (Bill of exceptions, par. 12, p. 64).

As to whether the defendants were guilty or not is a question of fact to be determined by the jury, and not by the Court. The Court has no right in his charge to the jury in criminal cases to express an opinion as to the guilt or innocence of the defendants. This is wholly the province of the jury.

U. S. vs. Battiste, 2nd Sum. 234.

Settinius vs. U. S., 5 Cranch, C. C. 584.

Some of the authorities hold that a judge in civil cases may express his opinion on the *weight* of evidence, and in cases where the jury is likely to be influenced by their prejudice it is well for him to do so, but care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory and is in no wise intended to fetter the exercise finally of their own independent judgment, and even in these cases if the language of the Court be intemperate and unfair though it does not withdraw the facts from the consideration of the jury it is ground of reversal. Striking and intense expressions when used by a judge can only mislead instead of aiding a jury in arriving at a correct conclusion as to the facts. All comments upon evidence by the Court should be given in a cool, dispassionate manner, and should be a fair statement calculated to aid and assist the jury rather than to mislead them or coerce them into the belief entertained by the Court. Such expressions as: "*I do not see any way that these defendants can be acquitted*," can only produce one impression in the minds of the jury. It is such an expression that might be expected to fall from the lips of the prosecuting attorney, bat never from a trial judge in his charge to the jury.

U. S. vs. 14 Packages, Gilp. 335.
" " Sarchet, " 273.
Lynn " Commonwealth, Penn. St., 288.

It will be observed that the Court in his charge to the jury in no place commented upon the evidence given by the different witnesses at the trial, or explained to the jury the effect of such evidence, but after having instructed them as to what the Court considered the law to be and near the close of his charge he practically told the jury that it was their duty to convict the defendants and to render a verdict of guilty as charged in the indictment. This is clearly a ground of reversal. Trial judges should never be permitted to so far invade the functions of the trial jury.

The Court committed manifest error in giving the instructions as found in the first and second paragraphs of the 11th assignment of error, (transcript, p. 29). To the giving of these instructions the defendants duly excepted. (See bill of exceptions, p. 65).

We contend that the Court did not correctly state the law of principal and agent, servant, or employe. We concede the law to be that if an agent acting for his principal and within the scope of his authority violates a penal statute that the principal may be found guilty. But if the agent violates a penal statute and commits a crime who does not act within the scope of his authority the principal cannot be held criminally liable for the acts of his agent. The Court should have so instructed the jury. The only inference the jury could draw from the instructions of the Court, as given, would be that the principal in every event would be guilty of every criminal act committed by his agent during the time the relation of principal and agent existed. This is clearly not the law, and we contend that the Court should have charged the jury that if they found that liquor had been sold by the agents, servants, or employes of the defendant Max Endelman, acting within the scope of their authority and under iustructions and with the knowledge of the principal, then the principal would be liable, but not otherwise. A principal cannot be charged with the criminal acts of his agents unless he has knowledge of or acquiesced in those guilty acts.

All of which is respectfully submitted.

CREWS & HANNUM and C. S. BLACKETT,

Attorneys for Plaintiff in Error.